IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Criminal Appeal No. 54 of 2004.

Judgement reserved on: 16.4.2007.

Date of decision: 24.4.2007 .

Kasam Deen ….. **Appellant.**

Vs.

State of H.P. ….. **Respondent.**

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The Hon'ble Mr. Justice Surjit Singh, Judge.

The Hon'ble Mr. Justice Sanjay Karol, Judge.

Whether approved for reporting?[1]

For the Appellant : **Mr. Anup Chitkara, Advocate with Mr. Bhupinder Ahuja, Advocate.**

For the Respondents : **Mr.Som Dutt Vasudeva, Additional Advocate General.**

Surjit Singh, Judge.

This appeal is directed against the judgement of Special Judge, whereby the appellant has been convicted of an offence, under Section 20(B) of the Narcotic Drugs and Psychotropic Substances Act (hereinafter called the Act) and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo simple imprisonment, for a further period of two years.

2. Prosecution version, as per record is like this. On 27.2.2002, Inspector Kulwant Singh (PW 10), SHO, Police Station, Chamba, assisted by ASI Narup Singh, LHC Kartar Singh (PW 1) and

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Whether the reporters of the local papers may be allowed to see the Judgment?

Constable Manohar Lal (PW 2) organized a Nakka near village Kandla, a place about 35 kilometers from Police Station, Chamba. Around 1.00 p.m. ASP Gianeshwar Singh (PW 9) accompanied by HC Ajit Kumar and Constable Yoginder Singh (PW 5) reached the site of the Nakka. He started imparting some instructions to the S.H.O. and the police officials accompanying him. In the meanwhile, a man was seen coming along the road. He was carrying a bag slung on his right shoulder. On seeing the police, he shuddered and immediately turned about and tried to run away. That aroused the suspicion of the police people. On the command of ASP Gianeshwar Singh his subordinates chased and nabbed him. The man was the appellant. The bag, which he was carrying, was searched. It contained another bag in which there was charas in the shape of balls and fingers. Constable Manohar Lal (PW 2) was deputed to fetch weights and scale and also to arrange two local witnesses. He brought weight and scale and two witnesses, namely PW 3 Man Singh and PW 4 Karam Singh. In the presence of these two witnesses, charas was weighed. It was found to be 8 Kilo and 500 grams. Two sample, each weighing 25 grams were separated. The samples and the bulk charas were made up into three separate parcels and the same were sealed. Search and seizure memo was prepared. The appellant was taken into custody. The case property i.e. the bulk charas, samples and the N.C.B. form, which was filled in on the spot, were deposited with the Moharrar Head Constable. One of the samples was sent to the Chemical Examiner, who after

chemical analysis reported that the sample contained contents of charas.

3. Appellant was challaned in the court of Special Judge, who after complying with the requirement of Section 207, Code of Criminal Procedure, charged him with the offence, under Section 20 of the Act, and on his pleading not guilty put him on trial. On the conclusion of the trial, appellant was held guilty and therefore, convicted and sentenced, as aforesaid.

4. Learned counsel made two submissions. His first submission was that the evidence on record proves the defence version and falsifies that of the prosecution. The defence version as suggested to Kartar Singh (PW 1) , Inspector Kulwant Singh (PW 10), ASP Gianeshwar Singh (PW 9) and two independent witnesses, PW 3 Man Singh and PW 4 Karam Singh, is that the appellant was forcibly taken away from his shop in village Tarwai on the fateful day to a place about one kilometer from Tarwai and there one man with the bag containing charas was present and that man handed over the bag to ASP Gianeshwar Singh and told that the same belonged to the appellant.

5. Learned counsel for the appellant drew the attention of the court to the statements of PW 3 Man Singh and PW 4 Karam Singh, who in their cross-examination by the accused admitted that the appellant was forcibly taken in a police vehicle beyond Tarwai and there the bag containing charas was handed over by some-one to the police officials with the saying that the same belonged to the appellant. Both these witnesses were declared hostile by the

prosecution. They were confronted with their statements, under Section 161, Code of Criminal Procedure.

6. These two witnesses have made contradictory statements and this fact alone is enough to disbelieve the defence version. While PW 3 Man Singh stated that he and Karam Singh (PW 4) had been taken by the police people from Kandla in their vehicle at 7.00 or 8.00 a.m. on the pretext that they should accompany them to the place 2-3 Kilometers away, but they were taken to Tarwai and at Tarwai one of the police officials alighted from the vehicle and brought the appellant and made him to sit in a police vehicle and then they proceeded further beyond Tarwai and at a distance of about one kilometer from Tarwai the police vehicle was stopped, when a man present there signaled to the police people and that man handed over a bag to the police people with the statement that the same belonged to the appellant, PW 4 Karam Singh stated that he and Man Singh (PW 3) joined the police investigation on 27.2.2002 at 1.00 p.m. at village Kandla. This he stated in the examination-in-chief. No doubt, when cross-examined, he did state that the appellant was associated by the police at Tarwai after having been summoned from his shop by the police officials and that he (the witness) and PW 3 Man Singh had been taken to village Tarwai in the police vehicle and that after the appellant was associated, the jeep proceeded beyond Tarwai and stopped after covering one kilometer where a man was present with a bag, who handed over that bag to the police and said that the same belonged to the appellant, but he nowhere stated that it was around 7.00 or 8.00 in the morning when he was carried in the police vehicle,

as stated by PW 3. As already noticed in the examination-in-chief, the witness stated that he and Man Singh joined the investigation at 1.00 p.m. at village Kandla. That means, the defence version as suggested to PW 3 that he and Karam Singh (PW 4) had joined the police at 7.00 or 8.00 a.m. and were carried to Tarwai and then to a place one kilometer from Tarwai, is not correct, even though it is admitted to be correct by PW 3 in the cross-examination conducted on behalf of the appellant.

7. Further more, the appellant in his own statement, under Section 313, Code of Criminal Procedure, though states that he was not arrested at the spot but from his shop on 27.2.2002 at 7.00 or 7.30 p.m., he does not say that he was carried to a point one kilometer beyond Tarwai and there a man handed over a bag containing charas to the police with the statement that the same belonged to him (the appellant). The omission of this fact in the statement of the appellant in his statement, under Section 313, Code of Criminal Procedure, is also indicative of the defence version, being not true.

8. Again, it was suggested to PW 9 ASP Gianeshwar Singh that two persons named Jai Dayal and Rama were present at the shop of the appellant when he was “forcibly taken away by the police”. But the defence did not examine either of these two persons.

9. No motive has been attributed to the police officials for the alleged false implication of the appellant and this fact also suggests that the defence version is not true. No suggestion was put to any of the police officials namely PW 9 ASP Gianeshwar Singh,

PW 10 SHO Kulwant Singh, PW 1 HC Kartar Singh, PW 2 Constable Manohar Lal and PW 5 Constable Yoginder Singh that PW 3 Man Singh and PW 4 Karam Singh were taken to Kandla from Tarwai, as stated by PW 3 in his cross-examination by the appellant and after picking up the appellant from his shop at Tarwai the vehicle was driven to a place one kilometer beyond Tarwai. Non-suggestion of this fact to the above named official witnesses also suggests that what PW 3 Man Singh and PW 4 Karam Singh have stated, is not correct.

10. Again even though the defence version was suggested to PW 1 HC Kartar Singh, PW 9 ASP Gianeshwar Singh and PW 10 SHO Kulwant Singh, it was not suggested to PW 2 Manohar Lal and PW 5 Yoginder Singh. As a matter of fact, PW 2 Manohar Lal, in no uncertain terms testified that he had been deputed to arrange weights and scale and also to bring some independent witnesses from the village and that he brought the weights and the scale and also two witnesses, namely PW 3 Man Singh and PW 4 Karam Singh from village Kandla. In view of this categorical statement it was all the more essential for the defence to have suggested its plea about the appellant having been taken into custody from his shop and then the appellant and the independent witnesses namely PW 3 Man Singh and PW 4 Karam Singh having been taken to a place one kilometer beyond Tarwai to PW 2 Manohar Lal.

11. Learned defence counsel stated that ASP Gianeshwar Singh had testified that on the night intervening 26th and 27th February, 2002, he and the police officials accompanying him had

stayed at Bairagarh Rest House, but the testimony of Chowkidar of that Rest House, examined by the appellant as DW 1 falsifies this claim of PW 9 ASP Gianeshwar Singh, leading to a presumption that he is not a truthful witness. PW 9 ASP Gianeshwar Singh in his testimony did not say that entry regarding his stay in the Rest House, Bairagarh was made in the Register. He simply stated that he did not know whether such entry was made or not. DW 1 Baija Ram the Chowkidar of the Rest House stated that ASP Gianeshwar Singh (PW 9) or for that matter any other police official did not stay in the Rest House on 26th February, 2002 and that there was no entry to this effect in the Register. As already noticed, Gianeshwar Singh (PW 9) stated that he did not know whether any entry had been made in the Register maintained at the Rest House. Therefore, it is quite likely that no entry was made. Now when there was no entry in the register, the Chowkidar, DW 1 Baija Ram, could not have testified that he (Gianeshwar Singh) or other police officials accompanying him stayed in the Rest House on the aforesaid date, because by saying so he would have invited trouble for himself on account of having not made the entry and charged the prescribed amount of rent.

12. In view of the above discussed factual position, the contention that the evidence on record proves the defence version and falsifies the prosecution story, cannot be accepted.

13. It was also submitted by the learned defence counsel that the sentence of simple imprisonment for a period of two years on account of default of payment of fine is oppressive. He submitted that the appellant is a poor man and at present he is in Jail and is unable

to earn any money to pay the fine. He urged that the term of imprisonment in default of payment of fine be reduced suitably, keeping in view the financial position of the appellant. Looking to the facts and the circumstances of the case, we do feel that the imprisonment awarded by the trial court in default of payment of fine is oppressive being not commensurate with the financial status of the appellant. Accordingly, we reduce the term of imprisonment in default of payment of fine to six months only.

14. With this modification in the term of imprisonment in default of payment of fine, the appeal is dismissed.

(Surjit Singh),
Judge.

April 24, 2007.
(*Hem*)

(Sanjay Karol),
Judge.